

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1506 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

CHHOTALAL M BHAVSAR

Versus

HEIRS OF SAKKAR JETHA RABARI

Appearance:

MR VC DESAI for Petitioner

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 16/06/2000

ORAL JUDGEMENT

Heard learned Advocate Mr. V.C. Desai for the appellant. The respondents are absent though duly served.

1. The appellant hereinabove has filed the present

appeal to challenge the order and decree of dismissal dated 10-9-1980 passed by the learned City Civil Judge, Ahmedabad City Civil Court, Court no.3, in the proceedings of Civil Suit no.1073/78.

That by the impugned order the learned City Civil Judge has rejected the application Exh.8 of the appellant-plaintiff accompanied to Chambers Summons Exh.7 with a prayer to implead the proposed parties as heirs and legal representatives of deceased defendant-Sakkar Jetha Rabari and has dismissed the suit on the ground that suit has abated on the death of the defendant.

2. That the appellant-plaintiff lodged a plaint being Civil Suit no.1073/78 on 27-3-1978 in the Ahmedabad City Civil Court against the defendant Sakkar Jetha Rabari with a prayer to claim a decree of perpetual injunction restraining the defendant from closing the ventilation (Jalia) made in the Northern wall of the house bearing Municipal Census no.1022/A/3 situated at Kangalpuri, Geeta Mandir Road, Ahmedabad by raising any illegal construction or otherwise in the open land of the defendant situated on the Northern side of the said house.

It is contended by the appellant(hereinafter referred to as the "plaintiff") in the suit that the plaintiff is the sole owner and occupier of the suit property as described hereinabove and has been using the ventilation made in the Northern wall of the said house to enjoy the easement of light and air since more than 28 years prior to the filing of the suit. That the ventilation admeasuring 2 1/2 ft. x 4ft. was made since construction of the house on the said property and at that time, the open land situated on the Northern side of the house was also owned and occupied by the plaintiff. That subsequently the defendant has purchased the said open land from the plaintiff for the purpose of tethering cattle. The plaintiff has alleged that the defendant was attempting to raise construction by raising wall on the North-South direction as well as in the East-West direction in the said open land situated on the Northern side of the suit property of the plaintiff and intends to close the disputed ventilation made in the Northern wall of the house of the plaintiff. That though defendant had no right to close the said ventilation, the defendant has threatened and has attempted to raise illegal construction on the said open land and to close the disputed ventilation, and thereby, the plaintiff was constrained to file the suit.

While lodging the plaint, the plaintiff had also taken out Notice of Motion accompanied by application for temporary injunction restraining the defendant from closing the disputed ventilation pending the hearing and final disposal of the suit. That vide order dated 27-3-1978, the then Chamber Judge granted ad interim relief of temporary injunction as prayed by the plaintiff against the defendant and by subsequent order dated 25-4-1978 ad interim relief was confirmed till final disposal of the suit.

That despite various attempts, the defendant could not be served with the order of injunction as well as the summons of the suit, and as such plaintiff obtained the order to serve the defendant by registered post.

That the defendant appeared through Advocate in the proceedings of the suit and filed affidavit-in-reply against the application for temporary injunction and also filed the written statement and the suit was pending for final disposal.

It appears from the record that pending the final hearing of the suit plaintiff moved Chamber Summons Exh.7 on 19-8-1980 with application Exh.8 to implead the proposed parties as stated in paragraph 2 as heirs and legal representatives of the defendant on the ground that the defendant Sakkar Jetha Rabari has expired on 27-6-1980. That vide impugned order dated 10-9-1980, learned City Civil Judge, Ahmedabad City Civil Court, Court no.3, rejected the Chamber Summons and application Exh.8 observing that suit having been based on a cause of action of personal threat given by the defendant to the plaintiff to close the disputed ventilation; the cause of action does not survive on the death of the defendant, and as such, suit stands abated and accordingly passed the order of dismissal, against which present appeal is filed. That the appeal was admitted by this Court (Coram: S.L. Talati, J.) vide order dated 4th December, 1980 and is notified today for final hearing. It may be noted that the respondents of the appeal are the heirs and legal representatives of the deceased defendant Sakkar Jetha Rabari who are duly served but they have remained absent.

Learned Advocate Mr. V.C. Desai has made submission on behalf of the appellant and has taken me through the record and proceedings of Civil Suit no.1073/78. It is required to be noted that the plaintiff had filed the said suit bearing no.1073/78 to

prevent disturbance to his easement right of enjoying light and air through the disputed ventilation which right was attached to the property and is heritable or transferable alongwith the property to the transferee. On said proposition of law, the impugned order of learned City Civil Judge, Ahmedabad City Civil Court, Court no.3 cannot be said to be legal, proper, just or reasonable to hold that the cause of action did not survive per se on death of defendant Sakkar Jetha Rabari as it was based on the personal threat given by the defendant to the plaintiff. However, it is pertinent to note that Mr. V.C. Desai, learned Advocate appearing for the appellant could not satisfy this Court that the plaintiff has also prayed for amendment of the plaint so as to implead necessary corresponding averment in the plaint attributing cause of action against the present respondents who were sought to be joined as defendant in the suit in the capacity of heirs and legal representatives of the deceased-defendant. Learned Avocate Mr. V.C. Desai fairly conceded that reading of the plaint as it is does not disclose any cause of action for the relief prayed in the suit against the proposed party qua the present respondent, and as such, even otherwise, the plaint was liable to be rejected under the provisions of Order VII Rule 11 (a), Civil Procedure Code. That being the position, the appeal cannot be said to be maintainable on the original plaint as suit was not competent without necessary averment in the plaint disclosing cause of action against the present respondent. No other contention has been urged on behalf of the appellant, and as such, appeal could hardly succeed on the ground which is urged at the Bar.

As a result of the above stated discussion, the appeal fails and stands disposed of as rejected. However, in the facts and circumstances of the case, no order as to costs.

(A.K.Trivedi,J.)

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